

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

UNITED STATES OF AMERICA, Docket No. 3:15CR24

 Plaintiffs, Toledo, Ohio

 v. April 11, 2016

AROLDO RIGOBERTO CASTILLO-SERRANO,

 Defendants.

TRANSCRIPT OF SENTENCING HEARING
BEFORE THE HONORABLE JAMES G. CARR
UNITED STATES DISTRICT JUDGE

APPEARANCES:

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1 Proceedings recorded by mechanical stenography, transcript
2 produced by notereading.

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1 COURTROOM DEPUTY: Case 3:15CR24-1, United States
2 of America versus Aroldo Rigoberto Castillo-Serrano, matter
3 called for sentencing.

4 THE COURT: Record should show defendant's
5 present in court with his attorney, Mr. David Klucas.
6 Government's also present through counsel, and Ms. Myrna
7 Greenwood from the U.S. Pretrial Service and Probation
8 office.

9 Counsel, have you each received and reviewed the
10 Presentence Report? If so, do you any objections other
11 than those previously raised, which I will address in a
12 moment? If not, are you prepared to proceed with
13 sentencing?

14 MS. MULHAUSER: No other objections on behalf of
15 the United States. We have reviewed the Presentence Report
16 and are prepared to proceed, Your Honor.

17 THE COURT: Record should also note that
18 Ms. Ellen Donahue, court certified interpreter, is
19 interpreting for the defendant.

20 Mr. Klucas, have you reviewed the Presentence
21 Report in Spanish with your client, I assume?

22 MR. KLUCAS: Yes, I did.

23 THE COURT: And Mr. Castillo-Serrano, did you go
24 over the Presentence Report with your lawyer?

25 THE DEFENDANT: Yes.

1 THE COURT: Did he explain to you what it said
2 and what it meant?

3 THE DEFENDANT: Yes.

4 THE COURT: Did he answer any questions you might
5 have had about it?

6 THE DEFENDANT: Yes.

7 THE COURT: Are you fully and completely
8 satisfied that he has undertaken to do all that he should
9 have undertaken to do to prepare both you and him
10 thoroughly for this morning -- this afternoon's
11 proceedings?

12 THE DEFENDANT: Yes.

13 THE COURT: Likewise, throughout the entire
14 course of the time that he's represented you since you were
15 arrested and charged, has he undertaken to do everything
16 that you believe he could have done and should have done to
17 inform himself about the government's case to meet with you
18 and to consult with you, to explain the government's case
19 and the law to you, and to advise you with regard to what
20 appears to be in your best interest to these proceedings?

21 THE DEFENDANT: Yes.

22 THE COURT: Is there anything that you told him
23 to do that he didn't do, go talk with somebody, go visit
24 someplace, look something up, file a motion or whatever,
25 any instructions or requests that he did not comply with?

1 THE DEFENDANT: We all -- we did everything by
2 mutual agreement.

3 THE COURT: Okay. Likewise, was there anything
4 that you told him not to do that he went ahead and did it
5 anyway?

6 THE DEFENDANT: No.

7 THE COURT: Let's turn to the -- it's my
8 understanding that as presently calculated, subject to a
9 challenge enhancement which would add to the amount, if I
10 understand correctly without that enhancement the guideline
11 range, base offense level 27, criminal history category of
12 one, and that would be a range of 70 to 87 months. There's
13 also an issue, I believe, with regard to the actual
14 criminal history category as it were, base offense level
15 27, criminal history category two being 78 to 97 months or
16 criminal history category three, 87 to 108 months. Is that
17 correct, counsel? Was the enhancement possibly increasing
18 it by four levels as the vulnerable victim, or have I
19 misunderstood?

20 MS. MULHAUSER: Your Honor, we believe that the
21 sub total before any subtractions is a level 36.

22 THE COURT: Okay. Well --

23 MS. MULHAUSER: And the government believes that
24 the correct criminal history calculation is a criminal
25 history level three.

1 THE COURT: Well, let's turn to the issue of the
2 four-level enhancement for victims.

3 Mr. Klucas, your position is that that should not
4 be imposed; is that correct?

5 MR. KLUCAS: That is correct, Your Honor. Can I
6 ask the government for one clarification?

7 THE COURT: Why don't you consult with her first
8 and then --

9 (Mr. Klucas and Ms. Mulhauser conferring off
10 the record.)

11 THE COURT: I guess there's also a question about
12 number of victims as well. I'm sorry. And before we
13 begin, I should have done this earlier perhaps, I want to
14 acknowledge the way in which the government has presented
15 the offense conduct. In the narrative form, it was
16 really -- it's far more helpful to have it done that way,
17 told as a story rather than picking and choosing bits and
18 pieces from the indictment, and then as all too often done
19 in the past and as you may be aware have requested to be
20 done in the form which is done here and other reports, I
21 know it's more work for everybody, but it is very helpful
22 to me. I am sure it's helpful to defense counsel as well
23 in preparing for these proceedings.

24 Okay. You are -- just by paragraph, Mr. Klucas,
25 which of the proposed enhancements are you objecting to

1 without referencing anything else except simply by
2 paragraph?

3 MR. KLUCAS: I would reference by paragraph in
4 the second Presentence Report, we object to paragraph 64.

5 THE COURT: Let me make sure I've got the --
6 Myrna, can I see the -- okay. I've got so much paper up
7 here. Any argument in that regard?

8 MR. KLUCAS: If I could, could I also note our
9 objection to paragraph 65 since the arguments are
10 inter-related?

11 THE COURT: Okay. Yeah. Go ahead.

12 MR. KLUCAS: Okay. Thank you. We had mentioned
13 this objection in our sentencing memorandum, and I want to,
14 at least for the purpose of this argument, just stand on
15 that portion of the memorandum that addresses the issues
16 raised by Johnson. It's a -- more of a preservation matter
17 than of real substance. The real substance argument we
18 believe is contained in the paragraphs above in the
19 sentencing memorandum in the Fifth Circuit cases which hold
20 that simply because an illegal alien is -- has illegal
21 status, that that doesn't make that victim more vulnerable
22 if illegality is a component of the offense conduct.
23 That's what the Fifth Circuit holdings says. That's also
24 referenced in the application note of Guideline 3A1.1,
25 which says do not apply this guideline if that conduct is

1 referenced in the appropriate sentencing guideline. And in
2 this case it does, because Guideline 2L1.1, which is what
3 applies to Count 14, certainly references that conduct.
4 Our argument is, is that enhancement does not apply because
5 the conduct that enhancement is supposed to elevate the
6 penalty for is contained within the offenses to which
7 Mr. Castillo-Serrano pled guilty. And so we believe that
8 neither the definition of vulnerable nor the number which
9 has also been addressed in another enhancement are
10 applicable here per the directives of the Fifth Circuit,
11 and more importantly for this proceeding per the directives
12 of the guidelines themselves. I think the guideline, given
13 all of the offenses to which Mr. Castillo-Serrano pled
14 guilty, specifically says don't apply it if it's embraced
15 in offense conduct.

16 MS. MULHAUSER: Thank you, Your Honor. To speak
17 briefly to Johnson first, I do not think Johnson applies in
18 this context. The armed career criminal act residual
19 clause is a much different beast.

20 THE COURT: I'm sorry, I didn't hear what you
21 just said.

22 MS. MULHAUSER: The armed career criminal act is
23 a much different beast. It is dealing with much less coy
24 conduct. Here we are dealing with a specific provision of
25 the sentencing guidelines that have been interpreted

1 successfully multiple times by multiple courts. We do not
2 believe Johnson applies.

3 As to the specific vulnerable victim issue,
4 leaving aside the question of whether or not the victims
5 are vulnerable as to their illegality, they are vulnerable
6 as to numerous other faculties.

7 THE COURT: I agree.

8 MS. MULHAUSER: I will stop there then.

9 I would also like to speak to the number of
10 victims, the vulnerable victim enhancement. The large
11 number of victims aspect of it has been looked at by
12 numerous courts, and we have those citations in our
13 sentencing memorandum and in our objection. I would just
14 like to point out to The Court that although we named ten
15 victims in the superseding indictment, the statute that
16 defines victims, which is 18 U.S.C. 3771, refers to victims
17 as any person directly and proximately harmed as a result
18 of the conduct. Your Honor has heard today about parents
19 who were directly threatened, about other family members
20 who were threatened, about people who had to live as a
21 result of the defendant's conduct. Your Honor, those
22 people are victims within the meaning of 18 U.S.C. 3771.
23 Now, we do believe, and we believe that the law supports
24 that ten victims alone is enough to make a large number,
25 but certainly, Your Honor, when we bring into account other

1 victims that are referred to in the PSR, that the defendant
2 himself refers to his own admissions of the PSR as there
3 being 35 victims, plus family members, plus the rest of it,
4 Your Honor, we believe we are safely in the category of a
5 large number of multiple victims.

6 THE COURT: Mr. Klucas?

7 MR. KLUCAS: We've had our word, Judge.

8 THE COURT: I agree with the government.

9 So now on the base offense level, where does that
10 leave -- where do these rulings leave the base offense
11 level according to the government?

12 MS. MULHAUSER: I believe that leaves us at 36,
13 Your Honor --

14 THE COURT: Okay. Would you agree, Mr. Klucas,
15 that --

16 MS. MULHAUSER: -- before -- before any
17 reductions.

18 THE COURT: I understand.

19 MR. KLUCAS: We would agree. Over our objection
20 we would agree.

21 THE COURT: Counsel, if you'll just approach for
22 one minute, please.

23 (A side bar conference was had off the
24 record.)

25 THE COURT: So the base offense level is, as

1 presently calculated this morning, is a 32 or 31?

2 MS. MULHAUSER: 31.

3 THE COURT: Okay. Now let's turn to the criminal
4 history category. I believe Ms. Greenwood has
5 calculated -- made a note -- at a level three.

6 Mr. Klucas?

7 MR. KLUCAS: Thank you, Judge. With respect to
8 the criminal history category, again, we have essentially a
9 two-part argument. The first part of the argument is that
10 the conviction for illegal re-entry referenced in paragraph
11 97 is essentially offense conduct embraced by
12 Mr. Castillo-Serrano's guilty pleas here. He was caught,
13 as you had warned the previous two defendants, caught
14 re-entering the country in December of 2014. He was in
15 transit to Marion, Ohio where he was going to live in the
16 trailer park and participate more directly in what was
17 transpiring.

18 THE COURT: Basically what you're saying is in
19 order for him to accomplish his criminal purposes, he had
20 to be in this country?

21 MR. KLUCAS: Exactly.

22 THE COURT: Not something he can do long
23 distance.

24 MR. KLUCAS: That's exactly --

25 THE COURT: And this was, as I recall, within the

1 period of the criminal activity period.

2 MR. KLUCAS: Definitely.

3 THE COURT: Makes sense to me. Let me hear from
4 the government.

5 MS. MULHAUSER: Thank you, Your Honor. This
6 conspiracy lasted for four years. The defendant did many
7 things in those four years that were not part of the
8 conspiracy, he ate lunch, he brushed his teeth. Not every
9 activity that the defendant engaged in during those four
10 years was part of the conspiracy.

11 Now, there is nothing in the defendant's
12 admissions of the plea, there is nothing in the PSR that
13 connects the defendant's returning to the United States to
14 his conduct. Indeed, when he is given the chance to
15 explain his own conduct in the PSR, he does not connect
16 them. You can see from the time period that the defendant
17 was perfectly capable of running the conspiracy from
18 Guatemala because, in fact, he did run the conspiracy from
19 Guatemala. So given that there's no evidence on the record
20 that connects them to the United States with the operation
21 of the conspiracy, we believe it would be a mistake to
22 include that as relevant conduct part of the conspiracy.

23 THE COURT: I would disagree. I think Mr. Klucas
24 has the better argument. I really do. I think that -- I
25 understand it was the actual back and forth here and there,

1 and just seems to me that it's much more likely than not
2 that that was -- he came back here for the purpose of
3 heading back up to Marion and taking charge directly here
4 and doing things attributed to him in the Presentence
5 Report and victim impact statements.

6 So that being the case, what effect does that
7 have on the criminal history category?

8 MS. MULHAUSER: Your Honor, we would retain our
9 objection to that. That said, my understanding is that if
10 that was not included, the defendant would have one point
11 of criminal history -- would have three points -- I'm
12 sorry, I was -- I was looking at the -- he would have three
13 points criminal history, and therefore he would be a
14 category two.

15 THE COURT: Okay. Mr. Klucas, would you agree
16 with that?

17 MR. KLUCAS: I would not, Judge. We had
18 indicated that we had a two-part argument. The first part
19 was about the illegal re-entry, and the second is the
20 two-point assessment for being on municipal court
21 probation. And I guess I understand that Ms. Greenwood has
22 to do that. I guess our argument is that that artificially
23 inflates the criminal history and doesn't provide The Court
24 with an accurate basis to assess the likelihood of future
25 offenses, the likelihood of recidivism and those portions

1 of what the criminal history category is supposed to
2 reflect. I'm very familiar with municipal court probation.
3 The violation I believe occurred because
4 Mr. Castillo-Serrano had returned to Guatemala, did not
5 answer a summons from the Marion Municipal Court and
6 probation was terminated. I think that probation is
7 attendant to his OVI conviction. I don't think that it's
8 necessary for The Court to make an accurate assessment as
9 to whether Mr. Castillo-Serrano has the requisite criminal
10 history to justify a higher categorization, and we'd ask
11 The Court to categorize Mr. Castillo-Serrano as criminal
12 history one for the one point for his municipal court
13 probation.

14 MS. MULHAUSER: May we have a brief moment with
15 The Court and counsel?

16 THE COURT: Candidly, I -- for whatever it's
17 worth, I disagree with Mr. Klucas. I think the guideline
18 range is appropriately calculated with regard to criminal
19 history.

20 MS. MULHAUSER: Your Honor, we would ask that
21 Mr. Klucas withdraw his comments because they are in
22 violation of the plea agreement, paragraph 14, that says
23 neither party will recommend or suggest in any way
24 departure or variance is appropriate. So we would ask that
25 Mr. Klucas withdraw his comments as not in conformance

1 with --

2 THE COURT: I don't find that to be -- I think

3 he's --

4 MR. KLUCAS: There's --

5 THE COURT: Also I think it's fair to say I

6 suspect there have been occasions in the past couple

7 decades you've been in front of me --

8 MR. KLUCAS: A few.

9 THE COURT: -- where you've heard me basically
10 toss that one out.

11 MR. KLUCAS: Correct.

12 THE COURT: And I think he was relying on -- more
13 upon his experience with me rather than trampling on the
14 plea agreement, so I'm going to -- I'm overruling the
15 objection. I think it's appropriately calculated, all
16 things considered, the fact that he went back to Guatemala,
17 probably I think it's fair to infer at least, I'm not
18 finding, but it's quite likely that he went back there in
19 furtherance of these criminal activities. Presentence
20 Report indicates, again subject to hearing from him and his
21 lawyer, that to some extent, the overall conspiracy was
22 facilitated by conduct in Guatemala. So I'm going to keep
23 it at criminal history category two, fairly and accurately
24 reflects his past criminal conduct and characteristic.

25 So that being said, base offense level of 31, if

1 memory serves -- it's been a long day.

2 MS. MULHAUSER: 31, category two, Your Honor, is
3 121 to 151 months.

4 THE COURT: Guideline range of 121 to 151 months.

5 Now, I should indicate that -- a couple things I
6 want to say. My understanding from counsel is that -- that
7 I heard this morning, is that deeds were -- what we call
8 deeds, conveyances of some sort of real property were taken
9 by or on behalf of this defendant to secure his payment --
10 payment of the, quote, smuggling fee, which at least
11 there's one reference which indicates it was \$15,000, we've
12 heard this morning 500 and 500 hundred, whatever it was.
13 It's my understanding that the government has asked the
14 defendant, and I want him to listen very carefully to what
15 I'm about to say, it's my understanding that although the
16 government has called upon this defendant to return those
17 conveyances, he has not done so. And in my view, that
18 places in jeopardy whether he should receive credit for
19 acceptance of responsibility. I'm going to continue this
20 matter for six weeks. I expect the defendant will cause
21 directly or indirectly to have each and every conveyance of
22 any kind whatsoever with regard to any property whatsoever,
23 whether located in Guatemala or in this country or
24 elsewhere, to be returned to the United States Attorney's
25 Office. Otherwise, the purpose of the prosecution and

1 conviction and the sentencing will be frustrated because
2 that would leave the opportunity open for this defendant
3 and others to profit from the crimes which he has committed
4 and to which he has pled guilty.

5 If that does not happen, quite candidly, sir, I
6 am going to ask how high is up in sentencing. It's my
7 understanding that as to each count of conviction, the
8 maximum potential sentence is 20 years; is that correct?

9 MS. MULHAUSER: For the trafficking counts, Your
10 Honor, yes.

11 THE COURT: Yes. I would also consider seriously
12 running every sentence consecutive. And at this point,
13 unless that happens, or if it does not happen I have an
14 adequate explanation of why it does not happen, at this
15 point, subject to hearing from counsel and you, I will
16 consider such a sentence to be sufficient but not greater
17 than necessary to accomplish the purposes of sentencing and
18 to see to it that nobody profits in any way whatsoever from
19 the crimes that you committed.

20 If I have not made clear already, which I think I
21 have, I find your conduct as portrayed to me so far, I
22 realize I have not heard from you, and I will, and I will
23 listen to you, but as portrayed to me so far, it is
24 reprehensible, aberrant and inhumane.

25 I'll tell you what came to mind when I read that

1 victim impact statement which was repeated here today about
2 the dilapidated condition of the trailers, no heat, no
3 beds, lack of food, lack of sanitary facilities, inflicted
4 upon children, what came to mind was a book I read 20 or 30
5 years ago by a Russian author, Aleksandr Solzhenitsyn,
6 called The Gulag Archipelago, the conditions in which
7 people were placed by the communist regime in Siberia, as I
8 read the Presentence Report, you helped to replicate and to
9 continue. So you had better do what you can to retrieve
10 each and every one of those conveyances, because if you do
11 not, do not come in front of me asking for a single shred
12 of leniency, because to do otherwise would put you in a
13 position of continuing to profit from the conduct which has
14 brought you here. I'll leave it to you and your lawyer to
15 discuss any questions you may have, or whatever you can do
16 to avoid that outcome. I think Mr. Klucas would probably
17 tell you that on the whole I'm a lenient sentencer. I look
18 the best I can for the redemptive qualities that each and
19 every defendant who comes before me may be able to display
20 to me, and I take those into every consideration in every
21 case. But upon learning that those conveyances have not
22 been returned, that they are still in either your
23 possession or possession of what we call constructively,
24 that is the possession of people who were, in effect,
25 holding them for you, I want you to know plainly, clearly

1 and unequivocally my response to that, let there be no
2 doubt about that.

3 THE DEFENDANT: Can I say something?

4 MR. KLUCAS: No.

5 THE COURT: I told your lawyer that he is
6 welcome, at the expense of the United States Government, to
7 employ counsel to assist you and him in seeing to it that
8 that happens, counsel in Guatemala, and I expect that that
9 will be accomplished.

10 MS. MULHAUSER: Your Honor, may I offer one point
11 on this?

12 THE COURT: Sure.

13 MS. MULHAUSER: The deeds have, in fact, been
14 signed over to Mr. Castillo-Serrano and his relatives, so
15 in addition to physically providing them, part of the
16 process in order to get them back has to be signing them
17 back over to their original owners.

18 THE COURT: Absolutely. If the government is in
19 any way dissatisfied, in any way whatsoever, I expect to
20 hear from them at sentencing.

21 MS. MULHAUSER: Your Honor, it's our
22 understanding that Mr. Castillo-Serano has previously
23 employed lawyers to help him transfer those deeds to his
24 relatives, so we anticipate he will not have a hard time
25 finding lawyers to transfer them back.

1 THE COURT: Well, I've made my point clear. He
2 will either continue to try to hang on to those assets, but
3 it will be a long time before he at least himself benefits
4 from them. I just want to make it clear. Again,
5 Mr. Klucas I'm sure will tell his client, you've never been
6 in front of me before, but I think it's crucial and fair to
7 both parties at the outset to let people know what I am
8 thinking so that they can address a sitting rather than a
9 hidden or moving target, and that's exactly what I'm doing
10 now. I have not made my mind up in terms of sentencing,
11 but the defendant is in a position to avoid a much more
12 severe outcome than otherwise is likely to be the case if
13 he complies with your request on behalf of the victims and
14 their families to do the right thing and to divest himself
15 and anybody else who may have any interest of any kind
16 whatsoever, through whatever means and device whatsoever in
17 any property in Guatemala or elsewhere that was acquired
18 during the course of, or in furtherance of the crimes that
19 he has committed.

20 That will be set for six weeks from today at
21 10:00 a.m. What -- what suits your convenience and saves
22 the government a little bit of money for them coming, noon
23 or 11?

24 MS. MULHAUSER: Honestly if it is not a Monday,
25 that is helpful. Otherwise, we are flexible, your Honor --

1 THE COURT: Six weeks is Memorial Day.

2 MS. MULHAUSER: We would actually like to make a
3 proposal, there is another co-defendant in this case who is
4 scheduled to be sentenced on June 27th. We would propose
5 combining those two things.

6 THE COURT: I would prefer that.

7 MR. KLUCAS: Can I look before I make a promise
8 that I can't keep, please?

9 THE COURT: Counsel, I do these on Mondays.

10 MS. MULHAUSER: That's all right. Thank you.

11 THE COURT: I can make it 11:00 or noon. It's my
12 money I'm trying to save.

13 MS. MULHAUSER: I appreciate that. I do.

14 THE COURT: Especially with what has to happen on
15 Friday.

16 MR. KLUCAS: June 27th is good for the defendant.

17 THE COURT: 27th?

18 MR. KLUCAS: 27th, yeah.

19 THE COURT: Okay, at 10:30?

20 MR. KLUCAS: That's fine.

21 MS. MULHAUSER: Would Your Honor prefer to
22 address the other financial restitution and the fines now
23 or --

24 THE COURT: No, I'll do that at the time of
25 sentencing. Basically what I've done is two things, one is

1 to resolve the objections and reach the current base
2 offense level and criminal history category, which, of
3 course, includes acceptance of responsibility.

4 Number two, I've tried to communicate to the
5 defendant as forcefully and as clearly and as plainly as I
6 could, what I expect him to be doing between now and then
7 to the government's satisfaction and my own and what will
8 happen if that doesn't happen.

9 Again, I'm not indicating what sentence I will
10 impose, it's just that I would expect that the sentence
11 that he does get will be severe and potentially
12 substantially more severe if he has failed to comply with
13 that request. It's up to him.

14 MS. MULHAUSER: Thank you, Your Honor.

15 THE COURT: Thank you, counsel. Anything further
16 from the government?

17 MS. MULHAUSER: Nothing further.

18 MR. KLUCAS: Not from the defendant.

19 THE COURT: Thank you. That will conclude this
20 proceeding.

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C E R T I F I C A T E

I certify that the foregoing is a correct transcript
from the record of proceedings in the above-entitled matter.

s:/Angela D. Nixon

Angela D. Nixon, RMR, CRR

Date